SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 30 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 787

DALE BRYSON, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Dale Bryson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming his convictions for conspiracy to sell narcotics and sale of narcotics.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in the appendix to this petition. App. 1a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1961. App. 5a. Rehearing was denied on January 10, 1962. App. 6a. The time for filing of this petition was extended until March 9, 1962, by order of Mr. Justice Brennan, entered on February 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the trial court was based upon 18 U.S.C. § 3231. The judgment of that court is printed in the appendix hereto. App. 6a.

QUESTIONS PRESENTED

1. Whether Rule 52(b), F.R.Crim.P., may be given so restricted a construction as to permit an appellate court to notice errors in instructions, not brought to the attention of the trial court, only if necessary "to prevent a manifest injustice."

2. Whether, under any construction of Rule 52(b), F.R.Crim.P., an appellate court may properly refuse to consider the failure of the trial court to instruct the jury on the necessity and meaning of criminal intent, in a prosecution for violation and conspiracy to violate narcotics laws, especially when the defendant has testified that his purpose in participating in the activities charged was to act as an informer for a local police officer and the officer in question has testified that the defendant did in fact inform him of the activities charged.

3. What the proper procedure is for prosecuting a single conspiracy to violate two statutes when the penalty varies with the offense found to have been the objective of the conspiracy:

a) Whether such a conspiracy may be charged in two separate counts, as if there were a sepa-

rate conspiracy to commit each substantive offense.

b) If so, whether the jury may be permitted to consider the case on the various conspiracy counts without being instructed not to convict different groups of defendants of separate conspiracies.

STATUTES AND RULE INVOLVED

Section 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4704(a), 68A Stat. 550, provides:

> "*General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Section 4705(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4705(a), 68A Stat. 551, provides:

> "*General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Section 7237 of the Internal Revenue Code of 1954, 26 U.S.C. § 7237, 68A Stat. 860, as amended, 69 Stat. 3, as amended, 70 Stat. 568, provides:

> "(a) *Where no specific penalty is otherwise provided.*—Whoever commits an offense, or conspires

to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

"(b) *Sale or other transfer without written order.*—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and——

"(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

"(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1),

the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000."

Rule 52(b), F.R.Crim.P., provides:

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT

Petitioner, operator of a bail bond office in Tulsa, Oklahoma, was indicted, with four others, on two counts of conspiracy to violate the narcotics laws. The first count charged a conspiracy to violate 26 U.S.C. § 4705(a) by selling narcotics without a written order on a treasury form. The second count, incorporating by reference the overt acts alleged in the first count, charged a conspiracy to violate 26 U.S.C. § 4704(a) by purchasing narcotics not in or from the original stamped package. The indictment also contained five substantive counts, petitioner being named a defendant in two of the five. R. 3-10.[1]

The prosecution proved, as the court below summarized it, that Charles D. Casey, an undercover agent of the Federal Narcotics Bureau, introduced himself to petitioner as Frank Whalen; that, through petitioner and petitioner's office, Casey met the other defendants; that Casey succeeded in making several purchases of narcotics from defendants other than petitioner; and that petitioner, through his contacts with the other defendants, helped to effect the transactions. App. 3a-4a.

The essence of petitioner's defense was that he cooperated with Casey in order to discover what he was up to, so that he could convey the information to a local deputy sheriff, an officer to whom he had sup-

[1] The record filed herein consists of a copy of (1) the bound, 232-page transcript of record from the United States District Court for the Northern District of Oklahoma, and (2) the separately paginated, typewritten record of proceedings in the Court of Appeals for the Tenth Circuit, all properly certified by the Clerk of the latter court on January 26, 1962. The record references in this petition are to the pages in the bound transcript.

plied information several times in the past. Petitioner's testimony that his purpose was only to learn and report and that he did in fact report what he had learned to the deputy sheriff (R. 180-82, 191) was corroborated by the latter officer. R. 163-68.

The trial court instructed the jury that there were two elements of the offense charged in the conspiracy counts: "first, the act, or acts, of the defendants in wilfully conspiring together to commit an offense or offenses against the United States, as heretofore detailed; and, 2, the commission or performance of one or more of the overt acts charged in the indictment." R. 211-A. The "heretofore detailed" instructions were as follows (R. 210-11):

> (a) That Count I charged that the defendants "unlawfully, wilfully and knowingly conspired . . . to commit offenses . . . by wilfully selling" narcotics.
>
> (b) That Count II charged the defendants with "an unlawful conspiracy . . . to commit offenses . . . by unlawfully purchasing" narcotics.
>
> (c) That the five substantive counts (setting forth the offenses allegedly the objectives of the conspiracy) charged that the respective defendants named therein "unlawfully sold" or "unlawfully purchased" narcotics, as the case might be.

No instruction was given on the necessity for or the meaning of criminal intent. Indeed, the jury was instructed that it could infer conspiracy from acts of the defendants "done in pursuance of an apparent criminal purpose." R. 211-A. The instruc-

tions on the substantive counts likewise omitted any reference to criminal intent.

The trial court also instructed the jury that the indictment actually charged "only one conspiracy to commit offenses against the United States," the purpose of separating the charge into two counts being merely to aid in determining a proper sentence, since the penalties were different for sale offenses and purchase offenses. R. 211-211A.

It does not appear from the record that petitioner objected to the instructions as given or requested any other instructions. All that appears is that when the trial court asked whether counsel were "satisfied with the instructions," the prosecutor replied: "We are satisfied, Your Honor." R. 217.

The jury returned a verdict of guilty against petitioner on the first conspiracy count and one of the substantive counts. It acquitted him of the other conspiracy count and the other substantive count. R. 11, 225. Petitioner was then sentenced to two concurrent five-year terms of imprisonment. App. 7a. Three of the other defendants were found guilty on both conspiracy counts, and the fourth, like petitioner, was convicted on the first conspiracy count and acquitted on the second. All of the defendants other than petitioner were found guilty of all of the substantive violations charged against them. R. 224-26.

On appeal to the Tenth Circuit, petitioner attacked his conspiracy conviction upon the ground that he could not validly be charged with two conspiracies when there was only one. As to both counts of which he was convicted, petitioner sought reversal for failure of the trial court to give adequate instructions to

the jury. The court below summarily rejected petitioner's first contention without explanation. App. 5a. As to the second contention, the court below, though concluding that petitioner's "participation in the conspiracy was but upon the fringe and foolish" (App. 4a), rejected the attack upon the insufficiency of the instructions, because "the record shows no objection to nor request for instructions in such regard" and "[e]xcept to prevent a manifest injustice (and none appears here) we will not consider" the claim of error. App. 4a-5a. Accordingly, on December 27, 1961, the court below affirmed petitioner's conviction. App. 5a. A petition for rehearing attacking a portion of the instructions not here relevant was denied by the court below on January 10, 1962. App. 5a.

REASONS FOR GRANTING THE WRIT

1. The decision below presents a very basic question as to the meaning of the plain error rule incorporated in Rule 52(b), F.R.Crim.P.: whether, in order for error to be noticed under Rule 52(b), it must be error but for which there would necessarily have been an acquittal; or whether substantial possibility that the error affected the result is sufficient basis for an appellate court to notice it. The question, obviously of great importance in the administration of criminal justice, has never been passed on by this Court.

In holding that no "manifest injustice" resulted from the erroneous instructions to the jury, the court below interpreted Rule 52(b) to mean that, even if petitioner *might* have been acquitted under proper instructions, the error was not to be noticed unless he *would* have been acquitted. An analysis of the instructions shows that the jury was told absolutely nothing

about criminal intent as an element of the offenses charged. Indeed, the jury was instructed that it could hold petitioner criminally responsible for acts done in pursuance of an *apparent* criminal purpose. It could, therefore, have assumed that petitioner was guilty, even if his *real* purpose was, as he testified, to aid in law enforcement. That possibility was heightened, moreover, by the fact that the agent of the Federal Narcotics Bureau who built the case was himself named in the indictment, but only as a co-conspirator and not as a defendant. R. 3, 8. The jury could have assumed from this circumstance that a participant in a narcotics transaction *ipso facto* commits an offense, regardless of his purpose, and may be convicted if the government sees fit to make him a defendant. It follows, therefore, that petitioner may have been convicted although the jury believed him free of criminal intent.

There is, of course, a possibility that, even if properly instructed, the jury could have convicted petitioner because it disbelieved both his testimony and the corroborating testimony of the deputy sheriff. It cannot be assumed that the court below was holding that one who cooperates with criminals in order to de-

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[1] The view formerly prevailing that the statutory narcotics offenses required no criminal intent has been modified by this Court's restriction of *United States* v. *Behrman*, 258 U. S. 280, to its own specific facts. See *Linder* v. *United States*, 268 U. S. 5, 22; *Morissette* v. *United States*, 342 U. S. 246, 260. The *mens rea* requirement applies *a fortiori* to the conspiracy count. *Cruz* v. *United States*, 106 F. 2d 828, 830 (10th Cir. 1939); *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747, 759 (2d Cir. 1918), *cert. den.*, 246 U. S. 662.

tect and apprehend them is himself guilty of the crime. The holding below must have been, therefore, that Rule 52(b) was inapplicable because the jury *could* have convicted petitioner even if properly instructed.

2. The Tenth Circuit's construction of Rule 52(b) as requiring certainty, rather than possibility, that the error produced the wrong result is in conflict with the interpretation of the Rule in other circuits. The Court of Appeals for the District of Columbia Circuit, for example, in *Mullen* v. *United States*, 263 F. 2d 275, 276 (1959), after concluding that an instruction omitting the requirement of an evil state of mind was erroneous, reversed the conviction pursuant to Rule 52(b) because the "jury *might* well have acquitted appellant but for the erroneous charge."[4] The Court of Appeals for the Third Circuit used Rule 52(b) to reverse a conviction in *United States* v. *Cumberland*, 200 F. 2d 609, 611 (1952), because "[t]he *likelihood* of injustice *seems sufficient* to require a new trial." The Court of Appeals for the Seventh Circuit, in *United States* v. *Raub*, 177 F. 2d 312, 315 (1949), although finding there was ample evidence to sustain the conviction, reversed the judgment under Rule 52(b) because of omission of an intent element from the instructions, pointing out that, under Rule 52(b),

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[3] It seems unthinkable that the government would urge, or the Court adopt a construction of the narcotics statutes which would subject to prosecution and conviction at the prosecutor's whim not only the "special employees" customarily used to ferret out violations, but also the regular officers of the Narcotics Bureau. See *State* v. *Torphy*, 78 Mo. App. 206 (1899), and authorities there cited; cf. 7 Wigmore, *Evidence*, 3rd edition, § 2060, subdivision (d), and cases cited at note 16.

[4] Emphasis here and hereinafter supplied.

the error need only be "*capable of* resulting in miscarriage of justice. . . ."

3. The Tenth Circuit's interpretation of Rule 52 (b) is also in conflict with the often-expressed philosophy of this Court that errors affecting fundamental rights of an accused may be noticed on appeal though not brought to the attention of the trial court. See, for example, *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Atkinson*, 297 U.S. 157, 160; *Brasfield* v. *United States*, 272 U.S. 448; *Wiborg* v. *United States*, 163 U.S. 632, 658. This Court has not yet specifically construed Rule 52 (b).[1] It has, however, said in a civil case that an appellate court may consider points not brought to the trial court's attention, "where injustice *might* otherwise result. . . ." *Hormel* v. *Helvering*, 312 U.S. 552, 557. Referring to the latter decision, it was said in *United States* v. *O'Connor*, 237 F. 2d 466, 472, n. 4 (2d Cir. 1956):

> "For obvious reasons the Federal Rules of Criminal Procedure should be given, if anything, a more liberal interpretation in this regard."

This Court has had one occasion in the past to correct the Tenth Circuit's interpretation of Rule 52 (b).[2]

[1] Omission from instructions of an essential element of the crime charged is, of course, a deprivation of fundamental rights. *Christoffel* v. *United States*, 338 U.S. 84, 90. Mere reference in the instructions to the willfulness element of the indictment is insufficient without an instruction of "evil intent." *Schaefer* v. *United States*, 251 U.S. 466, 482 (1920).

[2] The Court cited Rule 52 (b) in *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. 395, 412, n. 25 in connection with its statement that it can notice an incorrect instruction as "plain error" though it is not assigned or specified.

but the disposition of that matter seems to have left the problem still in need of clarification. In *Ryles* v. *United States*, 172 F. 2d 72, 74 (10th Cir. 1949), the court below, while recognizing that the evidence justified submission of an entrapment issue to the jury, but finding that no instruction on the issue had been requested, refused to apply Rule 52(b) because it could not say that there had been "a miscarriage of justice". There followed a petition to this Court for a writ of certiorari, arguing principally the contention that the Tenth Circuit was wrong in imposing "miscarriage of justice" as a Rule 52(b) standard. The memorandum of the Solicitor General, though not specifically confessing error, did not contest the contention that the court below had misapplied Rule 52(b). The Solicitor General suggested that "the interests of justice would be served by permitting the case to be retried . . . to explore the issue of entrapment fully and have all the relevant evidence presented." *Ryles* v. *United States*, October Term 1948, No. 593, Memorandum of Solicitor General, p. 13. This Court, by *per curiam* order, granted the petition for certiorari and, following the Solicitor General's suggestion, vacated the judgment and remanded the case for a new trial. *Ryles* v. *United States*, 336 U.S. 949.

It is submitted that this Court could not have reached the result it did in *Ryles* without overruling the Tenth Circuit's concept of "miscarriage of justice" as a standard for applicability of the plain error rule. Yet, the Tenth Circuit continues to cite its *Ryles* opinion as a proper statement of the rule, calling this Court's action a reversal "on other grounds." See *Fischer* v. *United States*, 212 F. 2d 441, 444 (10th Cir. 1954). It would seem, therefore, that, proper ap-

plication of Rule 52(b) will not be assured unless and until this Court once again grants certiorari on the issue.

4. This petition also brings before the Court the question of the procedure to be employed in prosecution for a single conspiracy to commit multiple offenses when the penalty varies with the offense found to have been the object of the conspiracy. This problem became significant with the 1948 amendment of the general conspiracy statute to provide a lesser penalty when the object of the conspiracy was a misdemeanor rather than a felony. Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U.S.C. § 371, see *Williams* v. *United States*, 238 F. 2d 215, 217 (5th Cir. 1956). The problem takes on importance, moreover, from the increasing number of criminal statutes which incorporate their own conspiracy provisions rather than relying on the general conspiracy provision in 18 U.S.C. § 371. See, for example, 18 U.S.C. §§ 241, 286, 372, 757, 793, 794, 956, 1201, 1951, 2153-56, 2271, 2284-85 and 2388. The magnitude of the problem was enhanced in regard to narcotics cases, such as the instant one, when, in 1956, Congress greatly increased the penalties for conspiracies in such cases. Act of July 18, 1956, c. 629, Title I, § 105, 70 Stat. 568, 26 U.S.C. § 7237.[1] It has become a common practice, in narcotics cases, to charge the same conduct as violating several different statutes. The

[1] To the extent that the problem bears specially on narcotics cases, its importance is enhanced by the great number of such prosecutions. It was pointed out in *United States* v. *Heyward*, 290 F. 2d 86, 97 (2d Cir. 1961), that narcotics cases constituted over 17% of the total number of criminal cases pending in the Southern District of New York both at the beginning and the end of the reporting year June 1, 1959 to May 31, 1960.

punishment imposable for a conspiracy to violate a narcotics statute has a very wide range depending on the statute violated. Thus, under the statutes claimed to have been violated in *Brown* v. *United States*, D.C. Cir., No. 16,135, decided January 12, 1962, the minimum sentence could have ranged from zero to five years and the maximum from five years to twenty years. Upon conviction of conspiracy to violate certain of the narcotics statutes, moreover, the defendant becomes ineligible for either suspension of sentence or parole. 26 U.S.C. § 7237(d). Where, therefore, it is clear that there has been only one conspiracy but that the objective was to violate more than one statute, the mode of prosecution is of vital significance.

This Court has never ruled on the question and the lower courts appear to be divided in their approach. Referring to a charge of conspiracy to commit both felonies and misdemeanors, the Court of Appeals for the Fifth Circuit has suggested that "it would appear to be the better practice to list all the felonies and all the mere misdemeanor objects . . . in separate counts. . . ." *Williams* v. *United States*, *supra*, 238 F. 2d at 218 n. 2. Another possible procedure is to charge in one count but instruct the jury to render a special verdict to specify the proven object or objects of the conspiracy. *Brown* v. *United States*, *supra*. In the Southern District of New York, one judge has held that a one-count charge of conspiracy in a case like the instant one would have been duplicitous. *United States* v. *Shackelford*, 180 F.Supp. 857 (S.D.N.Y. 1957). The government continues, however, in the Southern District, to maintain that it should charge in one count where the objects of the conspiracy may carry different penalties, relying upon the special verdict technique to provide

specificity. Thus, in successfully resisting defense motions for dismissal in a *Williams*-type situation, the government argued:

> "The only consequence of the distinction between a conspiracy to commit a felony and a conspiracy to commit a misdemeanor is in the possible sentence to be imposed. A defendant's right to be subject to a lesser maximum sentence if the jury convicts him only of a conspiracy to commit a misdemeanor can be safeguarded by requiring the jury to give a special verdict." *United States* v. *Braun*, S.D.N.Y., No. 61 Crim. 694, Government's Memorandum of Law filed November 9, 1961, p. 59.

In the instant case, the government, choosing to proceed as suggested by *Williams*, indicted in separate conspiracy counts although it claimed only one conspiracy. The jury was instructed that, despite the separation of counts, only one conspiracy was involved. Petitioner's attack upon the indictment for alleging one conspiracy in two separate counts was brushed aside in both courts below without discussion. Both courts below failed to consider the question here presented—whether, when there is one conspiracy, the case may be presented to the jury on an indictment and instructions which permit the jury to find that two of the five defendants were not guilty of it (as the jury here did in its Count II verdict) and, at the same time, that all five defendants were guilty of it (as the jury did in its Count I verdict).

Count I of this indictment charges a conspiracy to violate 26 U.S.C. § 4705(a) by sale of narcotics without the prescribed written order. Count II, on the same overt acts, charges a conspiracy to violate 26

U.S.C. § 4704(a) by purchase of narcotics not in or from the original stamped package. While it is settled that the two statutes define separate crimes even though there be but one transaction, *Blockburger* v. *United States*, 284 U.S. 299, a conspiracy to do the one act is but one crime, though with multiple objectives.[5] And so the government here realized when it took the position that there was only one conspiracy involved; and so the trial court instructed the jury. Since a conspiracy to violate § 4705(a) carries a sentence of five to twenty years, while a conspiracy to violate § 4704(a) carries a sentence of only two to ten years, it is important to know what a jury means by a verdict of guilty when the charge is conspiracy to violate both statutes. It was for that reason, the trial court told the jury, that the conspiracy charge in this indictment was stated in two separate counts. Had the jury, as to all defendants found guilty of conspiracy, found them guilty under the same count or counts, there would be no problem. But, as the case was presented to the jury, they seem to have been invited to split counts, with the result that petitioner and another were acquitted in Count II of a conspiracy of which they were convicted in

[5] This is all the more true in the instant case in view of the fact that 26 U.S.C. § 4704(a) forbids not only purchases, but also sales. Neither § 4704(a) nor § 4705(a), as this Court said in *Blockburger*, 284 U.S. at 304, is aimed at the transaction *qua* transaction, but rather at the violation of the statutory requirements—tax stamps and treasury order forms. A transaction violating § 4704(a) is a crime whether it be a sale or a purchase. By indicting in Count I for conspiracy to *sell* in violation of § 4705(a) and in Count II for conspiracy to *purchase* in violation of § 4704(a), the government created the illusion of two conspiracies, even though claiming only one, and thereby invited the jury to decide as it did.

Count I. This is so because, since there was only one conspiracy, it must have had the two objectives of which the other three defendants were convicted. There is no other possibility, unless there were two separate conspiracies—one with all five defendants participating and the other with only three defendants involved.

We submit that it would have been better practice to indict in one count for the one conspiracy to violate two statutes and then order the jury to render a special verdict as to whether the conspiracy had both objectives, or if only one, which one. The jury would also be instructed that, whatever objective it found the conspiracy to have, it could convict only such defendants as it found to have conspired to accomplish that objective. It would have been impossible, under such procedure, to find some defendants guilty of a conspiracy to accomplish one objective and others of a conspiracy to accomplish another objective when the government claimed and the evidence sustained only one conspiracy.

If, on any theory, it should be held proper to indict in separate counts, the validity of such an indictment should depend upon the giving of instructions calculated to prevent the jury from finding two conspiracies where only one is charged. When, in the instant case, petitioner questioned the validity of the indictment (R. 150, 210), the trial court, if it would not dismiss the conspiracy counts or, at least, compel the government to elect between them, was required to instruct the jury that it could not find different defendants guilty of different parts of the single conspiracy. The instructions given, however, not only were devoid of any such statement, but were later supplemented by answers to jurors' questions which could only have

further obfuscated matters. See the following colloquy:

"Another Juror: Your Honor, may I ask one direct? Does that count that—or, on counts 1 and 2, could those people involved be found independantly guilty or innocent, or are we speaking of a group there?

"The Court: No defendant may be found guilty——

"The Juror: I am speaking of two or more—could any two of the five be found guilty of the conspiracy without finding the other three?

"The Court: Oh, yes.

"The Juror: Thank you.

"The Court: Yes, you may find as many as two guilty and others not guilty under Counts 1 and 2. There must be at least two involved in order to have an unlawful agreement; you can't have less than two involved in an unlawful agreement or conspiracy. But you might find two guilty, and the other three not guilty, or three guilty and two not guilty,—as the case may be.

"The Foreman: Your Honor, for one more clarification—this is a hypothetical question, but if for example two could be found guilty upon one, under one set of circumstances of what we consider a conspiracy, and two different ones found guilty, but the circumstances involved though were entirely separated, would that still constitute guilt?

"The Court: What you have in mind would be a possibility of finding two separate and distinct, unrelated conspiracies?

"The Foreman: What we might consider unrelated, right.

"The Court: No—no, the charge is that there was but one conspiracy entered into by the parties,

> and under the instructions given you by the Court you would not be permitted to find the parties guilty of completely unrelated—more than one completely unrelated conspiracy." R. 220-221.

The trial court thus appeared to be telling the jury that, while it could not find any of the defendants guilty of a "completely unrelated conspiracy", it could properly break the one conspiracy into related subsidiary conspiracies and find different defendants guilty of different subsidiary conspiracies.

If, as we submit, it was improper to submit the case to the jury on this indictment and these instructions, it is anticipated that the government will say in opposition that the error was harmless since petitioner's five-year sentence is supported by the conviction of the substantive offense in Count VII. However, if the Court should reverse the judgment below on the other issue here presented—namely the misapplication of Rule 52(b), F.R.Crim.P., to the lack of any instruction on criminal intent, then the questions will arise whether petitioner may be tried again for the alleged conspiracy (of which the jury acquitted him by its Count II verdict) and, if so, whether he may be tried on the present indictment. The issue here under discussion is, therefore, a proper one for decision by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1962.